

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MEREDITH SUMMER,

Plaintiff,

U.S. District Court

Case No. 2:21-cv-12936

Hon: Judge F. Kay Behm

Hon: Magistrate Judge David Grand

v.

DETROIT PUBLIC SCHOOLS
COMMUNITY DISTRICT,
NIKOLAI VITTI, and ADRIANA RENDON,
Individually and in their official capacities,

Defendants.

Law Offices of Dewey Rick Martin
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OFFICE OF THE
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Counsel for Defendant Detroit
Public Schools Community District,
Nikolai Vitti and Adriana Rendon

**DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE
OR STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT**

NOW COME Defendants, by and through their undersigned counsel and pursuant to Fed. R. Civ. P. 15(a)(2), hereby move to strike or dismiss with prejudice Plaintiff's First Amended Complaint and Jury Demand which was filed on July 10, 2023. Defendants rely on their Brief in Support and the inherent power and discretion of this Honorable Court. Concurrence in this motion was sought in writing on July 21, 2023, and Plaintiff's counsel has failed to respond. LR 7.1.

Respectfully submitted,

s/Theophilus E. Clemons
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July 28, 2023

BRIEF IN SUPPORT

Statement of Issue Presented

Whether Plaintiff's First Amended Complaint (ECF 53) should be dismissed with prejudice or stricken where it was filed in response to Defendants' two dispositive motions, without leave of Court, and without the consent of opposing counsel?

Defendants say: Yes

Controlling Authority

<u>Case Law</u>	<u>Page</u>
<i>Crosby v. Twitter, Inc.</i> , 921 F.3d 617, 627-28 (6 th Cir. 2019).....	2
<i>Spadafore v. Gardner</i> , 330 F.3d 849, 853 (6 th Cir. 2003).....	2
<i>Total Benefits Planning Agency, Inc., v. Anthem Blue Cross & Blue Shield</i> , 552 F.3d 430, 438 (6 th Cir. 2008).....	2

Court Rules

Fed. R. Civ. P. 15(a)...	1
Fed. R. Civ. P. 15(b)(2).....	1

I. Facts

Plaintiff filed the original Complaint in this matter on November 2, 2021.

On June 19, 2023, Defendants filed Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(c)(ECF No. 50). Thereafter, on June 23, 2023, Defendants filed Defendants' Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56(c). (ECF No. 51).

In response to these two dispositive motions, on July 10, 2023, Plaintiff filed a First Amended Complaint. (ECF No. 53). Before filing, Plaintiff did not file a motion for leave to file her First Amended Complaint. Nor did Plaintiff seek consent from Defendants' counsel.

II. Law and Argument

Fed. R. Civ. P. 15(a)(1)(B) states that a "party may amend its pleading once as a matter of course within....21 days after ...service of a motion under Rule 12(b), (e), or (f)...." Thereafter, Fed. R. Civ. Pr. 15(a)(2) permits a party to amend its pleading "[i]n all other cases ... *only* with the opposing party's written consent or the court's leave." (Emphasis added).

Here, Plaintiff filed her First Amended Complaint in response to Defendants' dispositive motions, in direct violation of the foregoing rules. First, neither of Defendants' dispositive motions were filed pursuant to Rule 12(b)(e) or (f). So, Rule 15(a)(1)(B) provided no authority for the filing of the First Amended Complaint.

No authority was provided by Rule 15(a)(2) either. Plaintiff did not seek leave of this Court, nor did she seek consent of the opposing parties before unilaterally filing her First Amended Complaint.

Under these circumstances, dismissal with prejudice of the First Amended Complaint is the appropriate remedy for failure to comply with Rule 15(a)(1)(B) and 15(a)(2).

A “district court does not abuse its discretion by dismissing a complaint without leave to amend when no leave was sought.” *Total Benefits Planning Agency, Inc., v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 438 (6th Cir. 2008). Where a plaintiff fails to file a motion to amend or a proposed amendment indicating how the plaintiff would amend the complaint, a district court does not abuse its discretion by denying the plaintiff leave to amend. *See, e.g., Crosby v. Twitter, Inc.*, 921 F.3d 617, 627-28 (6th Cir. 2019)(affirming dismissal with prejudice of amended complaint and explaining that filing a “formal motion to dismiss” is a “critical” procedural requirement); *Spadafore v. Gardner*, 330 F.3d 849, 853 (6th Cir. 2003)(denying leave to amend and concluding that, because no motion for leave to amend was filed and no proposed amendment was submitted pursuant to Rule 15(a), the plaintiffs “failed to exercise the due diligence required to take advantage of Rule 15(a)’s dictate that leave to amend shall be freely granted.”

Here, as in *Crosby*, Plaintiff skipped the “critical” procedural requirement of filing a motion to amend before filing her First Amended Complaint (ECF No. 53). With no legal authority, or explanation, Plaintiff unilaterally filed this First Amended Complaint. Under the foregoing authorities, dismissal with prejudice of this First Amended Complaint is in order.

III. Relief Requested

Based on the foregoing law, Defendants respectfully request that Plaintiff’s First Amended Complaint (ECF No. 53) be dismissed with prejudice or stricken.

Respectfully submitted,

s/Theophilus E. Clemons
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July 28, 2023

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2023, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

s/Theophilus E. Clemons
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